

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 53,

Petitioner,

v.

CITY OF INDEPENDENCE, MISSOURI,

Respondent.

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Public Case No. R 2009-021

DECISION

Local 53 of the International Brotherhood of Electrical Workers (Local 53) petitions to represent employees serving in the positions of Engineer I, II, and III in the Power and Light Department of the City of Independence (City), and to have those employees added to the bargaining unit of Power and Light Department employees that it currently represents. As professional employees, however, the persons in the Engineer positions do not share a sufficient community of interest with the nonprofessional employees already represented by Local 53 to warrant their inclusion in the existing unit of Power and Light Department employees. Therefore, the Board designates a separate bargaining unit to consist only of those individuals employed by the City in the Engineer positions and directs that a representation election be held among the members of that unit.

INTRODUCTION

On December 4, 2009, Local 53 filed a petition requesting that a representation election be held to determine whether there was majority support among City employees in the positions of Engineer I, II, and III, Accountant II, and Forester to join an existing bargaining unit of City Power and Light Department employees already represented by the union. The City does not oppose having a representation election and also has agreed that employees in the position of Accountant II and Forester may be included in the existing unit. But the City does oppose the inclusion of employees in the Engineer positions in the existing unit on the ground that it is not

appropriate to include professional and nonprofessional employees in the same bargaining unit. The City, in addition to citing to the Board's consistent position that professionals and nonprofessionals should not be included in the same bargaining units, contends that the evidence in this case demonstrates that the City Engineers actually do not have a community of interest with the nonprofessional employees of the Power and Light Department. Local 53, in support of joining the Engineer positions to the current unit, cites decisions of the National Labor Relations Board, suggests that this Board's precedent is not as settled as the City contends, and argues that the evidence shows that the Engineers do have a substantial community of interest with their nonprofessional colleagues in the Power and Light Department.

Whether or not employees in a proposed bargaining unit share a community of interest is a question that goes to the core of the appropriateness of the proposed unit. This Board is authorized to hear and decide issues related to the appropriateness of bargaining units. § 105.525, RSMo. The Board held a hearing in Jefferson City, Missouri, on January 13, 2010, to allow the parties to provide testimony and other evidence regarding the issues raised by Local 53's petition. The Board's Employer Member Emily Martin and the Board's former Employee Member Peggy Cochran were present in person to hear the case. Representatives of Local 53 and the City attended the hearing and had a full opportunity to present evidence and make arguments. Both parties also took advantage of the opportunity they were given to file post-hearing briefs. Board Chairman Jim Avery and the Board's current Employee Member Lewis Moya have reviewed the transcript of the hearing and the briefs.

Based on our review of the whole record, including the evidence presented, arguments made, and briefing filed, we issue the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Power and Light Department of the City of Independence operates and maintains the electrical system that provides electricity to the City's more than 120,000 residents. The

City employs 217 individuals in this Department. All but about 57 of these Power and Light employees are currently represented by either Local 53 or the United Steelworkers Union in two separate bargaining units. The Power and Light employees work out of an administrative facility and a power plant at Blue Valley, a smaller power plant at Missouri City, and 13 substations.

The Power and Light Department employs ten engineers – three classified as Engineer III (the most skilled classification), six as Engineer II, and one as an Engineer I. Six of the engineers work out of the Power and Light engineering department, two work in the Blue Valley power plant, one serves as an environmental coordinator working with the Power and Light director, and one works in the rate department.

All of the City's engineers have college degrees in engineering or related fields. In contrast, no one currently in Local 53's bargaining unit has an engineering degree, including District Planners, System Operators, Engineer Technicians, and CAD (Computer-Aided Drafting) operators. (One recently retired District Planner did have an engineering degree.) Two of the three Engineer IIIs are licensed by Missouri as Professional Engineers. The third has a Master of Science degree in Environmental Science from an engineering college. Five of the six Engineer IIs are certified as Engineers in Training (the first stage of licensure preparatory to a Professional Engineer's license, which generally requires Engineer in Training certification and four years of engineering experience). The other Engineer II has five years of engineering experience in lieu of Engineer in Training certification, as permitted by the City's job description for the position. In addition to Engineer in Training certification, one of the Engineer IIs also possesses a license from Canada as a Professional Engineer. The Engineer I, who started work with the City in May 2009, has a Bachelor of Science degree in Electrical Engineering Technology. The City's engineers are hired in as engineers; employees in other job classifications are not transferred or promoted to engineering positions. Persons licensed as Professional Engineers must regularly complete continuing education hours to maintain those licenses.

The Power and Light Department engineers design components and processes for the City's electrical system and are generally called on to use their expertise to promote the safe and efficient operation of that system. They study proposed alternatives to, and problems in, the City's electrical system and conduct analyses regarding those alternatives and problems. For example, they may construct computer models of the distribution lines from the substations to customers' homes to look for problems with voltage, problems with line capacity, or transformer overload. Or when the electrical system is being expanded to new areas or facilities, the engineers determine the proper size, location, and coordination of power equipment needed based on information provided by the Department personnel that work directly with the power consumers. The engineers' ability to perform these duties derives from training and skills achieved through their degree programs and honed through their experience working as engineers.

The engineers also provide information, advice, coordination, and direction needed by other Power and Light Department employees, including current members of the Local 53 represented bargaining unit, to perform their daily job duties. The engineers working in the Blue Valley power plant have direct supervisory authority over activities at that plant. The engineers themselves report to senior supervisory officers of the Power and Light Department.

The City's engineers receive periodic performance evaluations. Among other factors, they are evaluated on their judgment and decision-making skills (such as identification and evaluation of issues, generation of alternatives, understanding of consequences, and reaching sound conclusions), professional competence and commitment, leadership, planning and resource development, staff development, and knowledge of the strategic direction of the City and the Power and Light Department. Department personnel included in the bargaining unit are not evaluated on these factors. As part of the evaluation process, engineers are asked for suggestions regarding organizational improvement; bargaining unit employees are not.

Under the federal Fair Labor Standards Act, the City's engineers are salaried employees and are not entitled to overtime pay for hours worked in excess of forty in a workweek. (The City does pay overtime rates to its engineers for emergency work to restore power caused by storm damage.)

CONCLUSIONS OF LAW

The sole issue presented to the Board is whether the City Power and Light Department employees in the classifications of Engineer I, Engineer II, and Engineer III may vote to be included within the existing bargaining unit of Power and Light Department employees that is already represented by Local 53, or instead, may only have a separate unit of their own. Which positions to include and which not to include in a bargaining unit are questions that necessarily arise when assessing the appropriateness of bargaining units. As noted above, this Board is authorized to hear and decide issues related to the appropriateness of bargaining units. § 105.525, RSMo. An "appropriate unit" is defined by statute as "a unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned[.]" § 105.500(1), RSMo. The Board has wide latitude under this statute to determine the appropriateness of bargaining units. *SEIU, Southwestern Joint Council No. 29 v. Dep't of Labor and Indus. Rels.*, Case No. 84-111, at 7 (SBM 1984).

The Board has developed a number of factors that are generally appropriate to consider when analyzing community of interest questions. *City of Poplar Bluff v. Int'l Union of Operating Engineers, Local 2*, Case No. 90-030, at 5 (SBM 1990). These factors aid the Board in focusing on similarities and differences in the work, supervision, location, collective bargaining history, and extent of union organization of the workers being considered for inclusion in a common bargaining unit. But the analysis is simpler in this case. Employees whose work is the practice of a profession inherently lack a community of interest with other employees not engaged in that profession.

The lack of a community of interest between professional employees and nonprofessional employees stems from their differences in outlook within the workplace. Professional employees have a substantial interest in maintaining the standards of their profession even though this might in certain instances be inconsistent with maintaining a united front with co-workers on issues related to general terms and conditions of employment. See S. Rep. No. 105, 80th Cong., 1st Sess. 11 (1947). Because of the time and resources that they have expended in learning and developing expertise in their profession, professional employees will also have a strong interest in personal advancement that could well be inconsistent with joining nonprofessional co-workers in common causes. See *Continuing the White Collar Unionization Movement: Imagining a Private Attorneys Union*, 12 <<http://www.kentlaw.edu/academics/plel/Kimberly-Chin-third-place-winner-2009-2010.pdf>> (last visited Oct. 7, 2010). Further, it is very possible that professional employees will identify more strongly with management than with their nonprofessional co-workers considering the necessarily close working relationship between professionals and managers in achieving (perhaps even in formulating) the goals of the employer. *Id.*

In light of the different workplace interests of professional employees and their nonprofessional colleagues, this Board has consistently held that professionals and nonprofessionals should not be included in the same bargaining unit. *Civilian Personnel Div., St. Louis Police Officers Ass'n v. City of St. Louis, Bd. of Police Comm'rs*, Case No. 84-116, at 11 (SBM 1984); *SEIU, Southwestern Joint Council No. 29*, Case No. 84-111, at 7; *Ferguson Reg. Nurses Ass'n v. Ferguson Reorg. School Dist.*, Case No. 76-010, at 3 (SBM 1976); *CWA v. Pike County Mem. Hosp.*, Case No. 76-009, at 4 (SBM 1976).

As our dissenting colleague notes, this Board has on a few occasions approved bargaining units that included both professional employees and nonprofessional employees. But these cases do not, as our colleague concludes, signal any relaxation in the Board's long-standing position that professionals and nonprofessionals do not share sufficient workplace

interests to justify the Board in approving a unit including both groups when this is a contested issue presented to it for decision. In all of the cases relied upon in the dissent, the inclusion of professionals and nonprofessionals in a common bargaining unit was either a matter actually agreed to by the parties or a circumstance accepted without question. *Int'l Union of Operating Engineers v. Duckett Creek Sanitary Dist.*, Case No. R 2000-059, at 10-11, 16 (SBM 2000) (parties stipulated that certain employees could comprise a separate professional bargaining unit but that they could also be included in a unit of nonprofessionals if they approved it through a *Globe* election procedure¹); *Kansas City Fed. of Teachers, Local 691 v. Kansas City School Dist.*, Case No. R 96-010 (SBM Certification of Representation 1996) (order certifying election of bargaining representative for agreed to unit that included both professionals and nonprofessionals); *CWA v. Dept. of Social Servs.*, Case No. 83-012, at 7 (SBM 1984) (parties stipulated to inclusion of several apparently professional positions in the bargaining unit); *SEIU, Local No. 50 v. City of Springfield*, Case No. 79-013, at 1-3 (SBM 1979) (Board approved bargaining unit that included chemists, nurse positions, and an assistant art curator; issue in case was whether communications clerks should be included in a unit of their own, not inclusion of the professional positions in the unit). Although the Board concludes that professional employees lack a community of interest with nonprofessional employees, it has not stood in the way when parties agree to units including both professionals and nonprofessionals.

¹ A *Globe* election is one conducted by the National Labor Relations Board in which professional employees that a union seeks to represent vote on two questions on their ballots: (1) Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining? and (2) Do you wish to be represented for purposes of collective bargaining by [the petitioning union]? The name derives from *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937), an early NLRB decision in which dual questions regarding representation were presented. *Globe* elections, which permit professional employees to join units with nonprofessionals if a majority of the professionals to be included vote to do so, are explicitly permitted by federal labor law. 29 U.S.C. § 159(b)(1). There is no similar statutory authorization in Missouri that permits professionals and nonprofessionals to be included in the same bargaining unit. Even if the statutory silence in Missouri on this point were interpreted as allowing this Board the discretion to approve such joint units, it would not for the reasons set out in this decision.

Now that the Board has again confirmed its view that professional employees should not be included in a bargaining unit with nonprofessional employees, the question remaining is whether the individuals in the positions of Engineer I, II, and III in the City's Power and Light Department are professional employees. They are. As the United States Supreme Court has stated: "Engineering is an important and learned profession." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 681-82 (1978). The Missouri Supreme Court likewise has recognized that engineering is a profession. *Bird v. Missouri Bd. of Architects, Professional Engineers*, 259 S.W.3d 516, 522-23 (Mo. banc 2008). See also *Strain-Japan R-16 School Dist. v. Landmark Systems, Inc.*, 965 S.W.2d 278, 281 (Mo. App. E.D. 1998) ("The engineering profession is a learned one . . ."); *Annen v. Trump*, 913 S.W.2d 16, 19 (Mo. App. W.D. 1995) ("Missouri statutes regulate the profession of engineering").

Unquestioning reliance on general statements regarding the status of engineering as a profession could be considered as too superficial a basis for concluding that the engineering positions at issue in a particular case are, in fact, professional positions. In order to make a particularized determination on this question, the Board turns to an examination of the work of the City's Engineers I, II, and III in light of the following factors that have been established by the Board for use when considering whether the work of a specific employee or group of employees is professional work:

- (1) Is the work predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work?
- (2) Does the work require the consistent exercise of discretion?
- (3) Does the work require an advanced educational degree?

Civilian Personnel Div., Case No. 84-116, at 11.

The work of the Engineers I, II, and III is predominately intellectual and varied in character. Employees in these classifications design components and processes for an electrical generation and distribution system. They engage in studies and analyses, including

computer modeling, of problems that arise in the system and of alternatives to existing facilities and practices. This work consistently requires the Engineers to exercise discretion as they are called upon to apply their expertise. The Engineers' work performance is specifically evaluated with regard to their judgment and decision-making skills and on planning and resource development. And, in order to perform their duties, the Engineers must call on the foundation of training they have received in obtaining their degrees in engineering and related fields. The Engineers' working conditions necessarily differ from those of the non-professional Employees. In addition, most of the City's Engineers also hold Professional Engineer licenses from the state of Missouri or Engineer in Training certification (which is a preparatory step to a Professional Engineer license). These facts lead to the conclusion that the Engineers do not share a sufficient community of interest with their co-workers in the existing bargaining unit with regard to work performed, supervision, proximity, and working conditions. Based on these facts, the Board easily concludes that the individuals employed by the City in the Engineer I, II, and III positions are professionals.

Because the employees in the Engineer I, II, and III positions are professional employees and do not share a community of interest with their co-workers in the existing bargaining unit, they may not be included in a unit with nonprofessional employees. They may only be in a separate unit of their own.

ORDER

The Board hereby designates a new appropriate bargaining unit in connection with the representation petition filed by Local 53 to consist of: All employees of the Power and Light Department of the City of Independence in the classifications of Engineer I, II, and III and excluding City employees in all other classifications. Because the Engineers I, II, and III are professional employees, they may not be included in the existing unit of Power and Light employees currently represented by Local 53.

DIRECTION OF ELECTION

The Chairman of the State Board of Mediation, or other representative designated by the Board or by the Chairman, shall conduct a secret ballot election among the employees in the bargaining unit described in the Order to determine whether unit members want Local 53 to be their exclusive bargaining representative. This election shall take place as soon as possible, but not later than 45 days from the date set out below. The exact time and place will be set forth in the notice of elections to be issued subsequently, subject to the Board's rules and regulations. The employees eligible to vote are those who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because of vacation or illness. Ineligible to vote are those employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election.

The Chairman directs the City to prepare an alphabetical list of names and home addresses of employees in the unit described above who were employed during the payroll period immediately preceding the date of this decision. The Chairman further directs the City to provide this list to the Board and to Local 53 within 14 calendar days from the date of this decision.²

² Although not an issue presented to the Board for decision, we note that the parties agree that City employees in the positions of Accountant II and Forester may be included in the existing unit represented by Local 53. Given this agreement, the Board, as noted above, will not interfere with the inclusion of what appear to be professional positions in the existing unit of nonprofessional employees. The question of how to move forward with regard to these positions that the parties agree may be included in the existing unit is an open one. The Chairman will schedule a conference to determine how to proceed with respect to the Accountant II and Forester positions with the goal of establishing an election schedule for these two positions that will result in an election at the same time as the one to be scheduled for the new Engineer unit.

Signed this 6th day of December, 2010.

STATE BOARD OF MEDIATION

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James G. Avery, Chairman

(SEAL)

Dissenting Opinion

Lewis Moye, Employee Member

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Emily Martin, Employer Member

DISSENTING OPINION

I respectfully dissent from my colleagues' conclusion that it is always appropriate to bar professional employees from joining with nonprofessional employees in a common bargaining unit. I recognize that this is a position the Board has taken in four prior decisions from more than a quarter century ago. *Civilian Personnel Div., St. Louis Police Officers Ass'n v. City of St. Louis, Bd. of Police Comm'rs*, Case No. 84-116, at 11 (SBM 1984); *SEIU, Southwestern Joint Council No. 29 v. Dep't of Labor and Indus. Rels.*, Case No. 84-111, at 7 (SBM 1984); *Ferguson Reg. Nurses Ass'n v. Ferguson Reorg. School Dist.*, Case No. 76-010, at 3 (SBM 1976); *CWA v. Pike County Mem. Hosp.*, Case No. 76-009, at 4 (SBM 1976). Age of course is not a reason in and of itself to deviate from past precedent, but age may be a signal that it is time to reevaluate that precedent. This is such an occasion.

Other Board decisions from the time period of these four cases demonstrate a less than rigid compliance with the prohibition on professionals joining units with nonprofessionals. In *SEIU, Local No. 50 v. City of Springfield*, Case No. 79-013, at 6, 8-10 (SBM 1979), the Board approved a bargaining unit that included chemists, nurses, and an assistant art curator along with clerks, receptionists, stenographers and typists, machine operators, investigators, and technicians. In *CWA v. Dept. of Social Servs.*, Case No. 83-012, at 11, 19-22 (SBM 1984), the Board approved a unit including microbiologists, chemists, nurses, and nutritionists with clerks, stenographers and typists, switchboard operators, technicians, laundry workers, and equipment operators. The Board did express some concern (at page 7 of the decision) as to the apparent inclusion of professionals in the same unit with nonprofessionals, but any concerns it may have had regarding lack of a sufficient community of interest between the two groups did not stop it from directing an election to determine whether the petitioning union had majority support of all members, professional and otherwise, of the agreed-to unit.

Subsequent actions of the Board hint of a quiet passing of the prohibition on combined professional/nonprofessional units. In *Kansas City Fed. of Teachers, Local 691 v. Kansas City*

School Dist., Case No. R 96-010 (SBM Certification of Representation 1996), a previous Chairman approved a bargaining unit consisting both of positions acknowledged to be professional positions, including accountants and occupational therapists, and of nonprofessional positions. Then, in *Int'l Union of Operating Engineers v. Duckett Creek Sanitary Dist.*, Case No. R 2000-059, at 10-11, 16 (SBM 2000), the Board authorized employees in acknowledged professional positions to vote, through a *Globe* election procedure, to join with their nonprofessional co-workers in a common bargaining unit.

As my colleagues note in their decision in this case, a *Globe* election is one in which a group of professionals that a union seeks to represent is given the opportunity to decide whether it wants to be represented by the petitioning union and also whether it wants to be included in a bargaining unit with nonprofessionals employed by the same employer. See *Duckett Creek*, Case No. R 2000-059, at 17-18. The *Globe* procedure recognizes that there may be some differences in perspective between professionals and nonprofessionals, but permits the professionals to join nonprofessional co-workers in one bargaining unit if a majority of the professional employees vote to do so.

By authorizing and then overseeing a *Globe* election in the *Duckett Creek* case, the Board has already departed from its earlier blanket refusal to approve bargaining units including both professionals and nonprofessionals. I would now explicitly recognize this change. There are ample reasons to do so.

Although not binding on the Board, it is significant that the federal labor law has permitted combined units (if the professionals vote to join such a unit) since at least the enactment of the Taft-Hartley Act in 1947. See 29 U.S.C. § 159(b)(1). We need no such explicit statutory authorization to take a similar position. This Board is charged with the general responsibility to determine the appropriateness of bargaining units. § 105.525, RSMo. The Board reached its past decisions barring joint professional/nonprofessional units based on this

charge. If we believe it is time to change that position, we may do so based on the same authority.

But it is not enough to just blindly follow federal practice. We need to examine whether the federal practice is well-taken. As my colleagues set out in the decision in this case, there are at least three possible differences in interests between professionals and nonprofessionals: (1) professionals have a strong interest in maintaining the standards of their profession that could prevent them from supporting bargaining positions advocated by nonprofessionals; (2) because of the time and resources they have invested in obtaining their expertise, professionals have a strong interest in personal advancement that could be inconsistent with joint interests of a joint professional/nonprofessional unit as a whole; and (3) because of a close working relationship with managers, professionals may identify more closely with management than with fellow employees. I agree that these differences are potentially sufficient to render a bargaining unit dysfunctional or result in the interests of one group being subordinated to the interests of the other. But if the Board determines, on the basis of the factors it normally considers in determining the appropriateness of a bargaining unit, *see City of Poplar Bluff v. Int'l Union of Operating Engineers, Local 2*, Case No. 90-030, at 5 (SBM 1990), that the particular professionals and nonprofessionals at issue share a general community of interests, I would let the two groups decide for themselves whether to join one another in a common unit.

In doing so, I would expand the federal *Globe* election procedure to require the consent of both the professionals and nonprofessionals before authorizing a joint unit. Professional employees may choose not to be part of a joint unit because of concerns that the other unit members will not give enough weight to their interest in maintaining professional standards and in their interest in having opportunities for individual advancement with the employer. But nonprofessional employees may also be disinclined to join with professional employees due to their individualistic attitudes or their closeness to management. Both groups may, however,

despite some differences in outlook, believe they are stronger together than apart. If so, they should have the opportunity to work together in one unit.

Turning to this case, I agree that the individuals serving the City's Power and Light Department in the positions of Engineer I, II, and III are professional employees. Based on my examination of the record, I think that these individuals generally share a sufficient community of interest with their co-workers in the existing bargaining unit with regard to work performed, supervision, proximity, and working conditions to justify Board approval of the inclusion of the engineers in the existing unit so long as a majority of both the engineers and their co-workers support this. I would direct an election process that would permit these two groups to register their views and then, if they agreed to join with one another, approve a joint unit.

A handwritten signature in dark ink, reading "Lewis B. Moye Jr." in a cursive script.

Lewis Moye, Employee Member